91-993

Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Writ of Certiorari In The United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. May a discriminating seller avoid this Court's holding in *Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990), condemning arbitrary discounts and classes of trade, by alleging a meeting competition defense which is itself predicated upon an arbitrary classification of purchasers, which classification was rejected by the jury?

2. May a meeting competition defense be established under the Federal *Robinson-Patman Act* (15 U.S.C. §13(b)) without any evidence identifying competitors, competitive offers, or any prices of unidentified competitors?

3. May a meeting competition defense be established when the only pricing evidence presented relates to a functional level of competition that is irrelevant to the discrimination?

4. May a discriminating seller properly claim to be "meeting competition" when the prices allegedly being "met" are established under the system of pricing condemned by *Hasbrouck*?

5. Is the existence of antitrust injury properly presumed where competition is keen, profit margins are small, the discrimination is relatively large and admitted to be competitively significant, and the discrimination has existed continually for many years?

6. Was the jury's finding regarding antitrust injury having been suffered by the Petitioner fatally flawed by the District Court's erroneous submission of the meeting competition defense to the jury?

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LIST OF PARTIES

The parties to the proceedings below, and Petitioners herein, are: Michael Tolokan, Jr. individually, and d/b/a Joe and Mike's Service Station and J & M, Inc. Petitioners are referred to collectively as "Tolokan".

Party to the proceedings below, and Respondent herein, is the Mobil Oil Corporation.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MICHAEL TOLOKAN, JR., individually and
d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reprinted within the separate Appendix as Appendix A. The Verdict Form of the District Court for the District of Connecticut is

reprinted as Appendix B.[1]

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was entered on September 16, 1991. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal *Robinson-Patman Act*, 15 U.S.C. § 13(a) *et. seq.* Relevant portions of the *Robinson-Patman Act* are reprinted as Appendix C.

Clayton Act, § 4, 15 U.S.C. § 15. Relevant portions of the *Clayton Act* are reprinted as Appendix D.

Federal *Rules of Civil Procedure*, Rules 50(a), 50(b)

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[1] References to "A" are to Appendix A, the Court of Appeals decision; references to "B" are to Appendix B, the District Court Jury Verdict Form; references to "Tr." are to the transcript record before the District Court; references to "E.R." are to the Excerpts of Record in the Court of Appeals Appendix; references to "Ex." are to those exhibits entered into evidence before the District Court.

and Rule 59. Relevant portions of Rules 50 and 59 are reprinted as Appendix E.

STATEMENT OF THE CASE

This case raises fundamental issues of importance with respect to the proper interpretation and application of the antitrust laws, particularly the *Robinson-Patman Act* (price discrimination and meeting competition defense), and the *Clayton Act § 4* (antitrust injury), and an attempt by a discriminating seller to circumvent this Court's recent holding in *Texaco v. Hasbrouck, supra*.

First, may a seller discriminating between two buyers, without regard to any legitimate functional difference or cost justification (contrary to *Hasbrouck*), avoid antitrust liability by now claiming to be "meeting" the prices of competitors, which prices themselves are established pursuant to the very same arbitrary system of buyer classification condemned by *Hasbrouck*?

Second, may discriminating sellers, with industry incentives toward discrimination, insulate themselves (and hence each other) from antitrust liability, which should result from the use of a pricing system based on

an arbitrary classification of purchasers, by generally claiming that they are doing so to meet the very same arbitrary pricing practices and systems of others?

Third, may a meeting competition defense under the *Robinson-Patman Act* be established without the identification of competitors, without evidence of competitive prices, and without evidence of competitive offers available to a favored buyer at any point in time?

Finally, this case calls upon the Court to decide whether the erroneous submission of such a defense to a jury impinges upon the jury's proper application of the antitrust laws, including the presumption of antitrust injury resulting from a violation of the law. In this regard, it will be important for the Court to state whether the presumption and inference of injury, appropriate in antitrust cases involving significant and lengthy price differences in highly competitive markets with low profit margins, is equally applicable to situations where the favored buyer does not undercut the disfavored buyer in price, but rather, is able to use

the higher profits derived from the discrimination to maximize its profitability while the disfavored buyer is prevented from earning and using such enhanced pricing or profits to improve its competitive position (and hence competition) in the marketplace.

A. *STATEMENT OF FACTS*

The Petitioners (collectively referred to as "Tolokan") owned and operated a gasoline service station on Route 1 in Guilford, Connecticut. During the relevant time period of February 23, 1981 through September 2, 1988, Tolokan purchased his gasoline exclusively from the Respondent ("Mobil"), pursuant to a gasoline supply agreement, and operated his service station exclusively under the "Mobil" brandname. Tolokan owned the property upon which his station was located, as well as the station facility itself. Mobil delivered the gasoline it sold to Tolokan directly to his station.

Over the same time period, another Mobil branded retail gasoline station was located

approximately one mile from the Tolokan station, also on Route 1 in Guilford. This service station facility was owned and operated directly by Aldin Associates ("Aldin"). The Aldin station also purchased its gasoline exclusively from Mobil during the relevant time period, and sold that gasoline to the public under the "Mobil" trademark.

Based upon these facts, the jury found that the Tolokan and Aldin stations were in competition with one another between 1981 and 1988, and that they did business in competition with one another at the same retail functional level, i.e. the jury rejected Mobil's claim that Aldin was a distributor/wholesaler. (Verdict Form, App. B, Questions 2 and 3.)

It was undisputed that the Mobil gasoline sold by Mobil to Tolokan and to Aldin was of like grade and quality, was sold in interstate commerce, and that the sales in question were commensurate in time with one another. However, over the entire damages time period of approximately nine years Mobil sold its gasoline to

the Aldin station at a price averaging five cents less per gallon for each grade of gasoline. (January 22 Tr. at 66, 97.) Even Mobil's expert admitted that the acknowledged five cent discrimination was "competitively significant". (January 22 Tr. at 100.) At times, Mobil charged Tolokan as much as 26.4 cents per gallon more than it charged Aldin. (P. Ex. 15, Prices of March 8, 1986.)

Based upon these facts, the jury found that Mobil had charged Tolokan a higher price for Mobil gasoline than it charged Aldin for the identical product and that, as a result, competition may have been harmed. (Verdict Form, App. B, Questions 1 and 4.)

In defense of its discriminatory pricing, Mobil claimed that its lower prices to Aldin were protected by the meeting competition defense of the *Robinson-Patman Act*. However, Mobil presented no evidence whatsoever regarding:

- the identity of alleged "competitors";
- prices of those unidentified

"competitors" at any time during the relevant nine-year damages period;

- evidence regarding the existence of any relevant competitive offers to Aldin;[2]

- evidence regarding the availability of such competitive products to Aldin.

Rather, Mobil's "meeting competition defense" was based entirely upon testimony that once Mobil had unilaterally determined that a purchaser (i.e. Aldin) was to be considered within the favored "distributor class of trade", it would receive the significantly favored prices attributable to that arbitrary characterization. Mobil presented no evidence identifying any "functions" performed by such a favored buyer, and no evidence regarding any quantification of the value of any such alleged "functions", or "cost justification", in legitimization of the substantial discounts afforded to

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[2] The only document that could possibly be considered to be a competitive offer (Ex. KKK) was conceded by Mobil to be irrelevant. (January 15 Tr. at 29-30.)

those characterized by Mobil as "distributors". According to Mobil, such factors were "irrelevant" to its pricing practices. (Testimony of Mobil's pricing manager, Pryor, January 18 Tr. at 118-120, 124.)

It was also irrelevant to Mobil, in setting its prices, whether all, or a portion of the lower priced gasoline sold to an entity arbitrarily considered by Mobil to be within the "distributor class of trade", was thereafter sold directly at retail by the favored buyer who performed no actual distributional functions. (January 18 Tr. at 69, 127, 138.)

Mobil's "meeting competition" defense was therefore wholly based upon Mr. Pryor's testimony that it was his job at Mobil to review generally the prices which other refiners posted as their "jobber terminal price" (i.e. prices to distributors) at various petroleum terminals around the country, without regard to whether or not any distributional functions were actually performed by this favored "class of trade". (January 18 Tr. at 58-59, 76-78, 86-87, 93-98, 110-114, 118-120, 124:

"*I don't analyze the distributors cost, couldn't care, frankly.*", lines 6-7.)[3]

Moreover, Mobil's "meeting competition defense", and all evidence presented in support of that defense, related only to Mobil's pricing practices, and those of its purported "competitors", at the *wholesale/distributor functional level.* Mobil's defense was therefore predicated upon a factual finding by the jury that the favored buyer, Aldin, was actually a distributor/wholesaler, rather than merely arbitrarily characterized as such by Mobil. However, the jury rejected Mobil's designation, finding that Aldin was a *retailer* operating at the same *retail* functional level as Tolokan, rather than a wholesaler/distributor. (Verdict

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[3] Although Mobil's pricing manager stated that he reviewed Mobil's pricing with respect to these unidentified "competitors", confirming that such information was apparently available to Mobil when he testified, such evidence was not provided by summary or otherwise at the time of trial. (January 18 Tr. at 96-98, 137.)

Form, App. B, Question 3.)[4]

At the conclusion of the presentation of Mobil's case, Tolokan moved for a directed verdict regarding Mobil's meeting competition defense. (E.R. 88-89.) Tolokan based this motion upon the fact that:

1. Mobil had failed to meet its burden of proof regarding the existence of facts necessary to establish a meeting competition defense pursuant to 15 U.S.C. 13(b); and

2. Any evidence supporting the existence of a meeting competition defense applied only to the "distributor class of trade", which was wholly irrelevant to Mobil's sales to Aldin, since the facts conclusively showed that Aldin was a retailer, not a distributor or wholesaler.[5]

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[4] The sole "function" performed by Aldin not performed by Tolokan (because he was not permitted to do so) was the delivery function to its own retail station. However, Mobil provided no evidence reflecting an appropriate value attributable to the performance of such a function. The jury therefore found that the lower price offered to Aldin was in no way cost justified. (Verdict Form, App. B, Question 7.)

[5] That Aldin was a retailer, not a distributor, was later confirmed by the jury's finding. (Verdict Form, App. B, Question 3.)

The Court denied Tolokan's motion, and allowed the jury to consider Mobil's meeting competition defense.

Aditionally, although even Mobil's expert admitted that the acknowledged five cent discrimination was "competitively significant" (January 22 Tr. at 100), Mobil claimed that Tolokan could not have suffered any damages as a result of the proven discrimination since, for most of the damages period, Aldin, even though a favored purchaser, had sold its gasoline at retail at prices that were higher than those charged by Tolokan.

However, the uncontradicted evidence established that the substantially favored price afforded to Aldin provided it with great competitive marketing latitude, allowing Aldin to basically ignore customary price-volume considerations, while seeking to maximize its profit on each gallon of gasoline it sold by taking advantage of the substantial competitive discrimination. (January 15 Tr. at 186-187, 190-191; January 16 Tr. at 23.)

Because of the increased profit generated by the discrimination, Aldin was able to expend considerable sums remodeling its facility, including installation of desirable self-service facilities, and storage tank replacement. (January 16 Tr. at 11-12.)

To the contrary, because Tolokan was charged a substantially higher price over the entire damages period, the margins of net and gross profit which he was able produce were substantially less than Aldin's. As a result, Tolokan was unable to generate sufficient income to renovate his facilities, modernize his gasoline sales facility to include self-service, or install new underground storage tanks. (January 15 Tr. at 189; January 16 Tr. at 13.) Tolokan was also required to pay special heed to the customary retail price-volume interrelationship, which was basically ignored by Aldin as a favored buyer. (January 15 Tr. at 186-187, 190-191; January 16 Tr. at 13.)

The evidence further established that, if the wholesale prices which Mobil offered to Tolokan and

Aldin had been non-discriminatory, Tolokan would have also been able to compete effectively with the Aldin location, while providing a lower retail price to the public, thereby generally reducing the level of retail gasoline prices in Guilford, while significantly increasing his own volume and profitability. (E.g. January 15 Tr. (Professor Cotterill, Tolokan's expert economist) at 162-163, 178-180, 185-191; January 16 Tr. at 10-13, 18-23, 32-34; January 11 Tr. (Tolokan testimony) at 56-72; 78-79, 83-84, 88-89, 96-97, 100-102.)[6]

After the denial of Tolokan's Motion for Directed Verdict regarding Mobil's meeting competition defense, the jury found that Mobil's lower prices to Aldin were not cost justified (Verdict Form, App. B, Question 7),

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[6] Tolokan's expert utilized three separate theories establishing the existence and amount of damage. This resulted in alternative damage quantifications of $425,587.42, $462,000 and $889,000. The expert testified that he believed the lower of the three alternatives (comparison group method calculation) was the most accurate since it required the fewest hypotheticals and assumptions. (January 16 Tr. 34, 44-47, 181-182, 188; January 17 Tr. 33-48; Ex. 20.) This evidence was wholly uncontradicted.

that competition may have been harmed as a result of the different prices charged to Tolokan and to Aldin by Mobil (Verdict Form, App. B, Question 4), that the lower price offered to Aldin by Mobil was to meet the equally low price offered by Mobil's competitors (Verdict Form, App. B, Question 6), and that Tolokan had therefore not been injured in a way that violated the antitrust laws as a result of Aldin paying a lower price for gasoline (Verdict Form, App. B, Question 5). Pursuant to the Verdict Form, the jury did not determine whether or not Tolokan had been damaged by Mobil and, if so, in what amount. (Verdict Form, App. B, Question 8.)

B. BASIS OF FEDERAL JURISDICTION

The basis for federal jurisdiction in the court of first instance (District Court) was pursuant to 28 U.S.C. §1331, as a result of the "federal questions" arising under the *Robinson-Patman Act*, 15 U.S.C. 13(a) *et seq.* and Sections 4 and 6 of the *Clayton Act*, 15 U.S.C. §§ 15 and 26.

REASONS FOR GRANTING THE WRIT

I. MOBIL IS SEEKING TO AVOID THIS COURT'S HOLDING IN *TEXACO v. HASBROUCK, SUPRA,* BY ALLEGING A FACTUALLY UNSUPPORTABLE MEETING COMPETITION DEFENSE.

After this Court's holding in *Hasbrouck*, it became abundantly clear to refiners, including Mobil, that they would no longer be able to perpetuate their discriminatory pricing practices by arbitrarily establishing "classes of trade" which bore no relationship to functions actually performed by favored buyers, or to the value of those functions. Therefore, in an attempt to preserve its (and the petroleum industry's) condemned discriminatory pricing system, Mobil herein claims that its discriminatory pricing system "meets the competition", which competition consists of precisely the system condemned by this Court in *Hasbrouck* and *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969), i.e. discounted prices given to favored purchasers who perform no functions.

It is to be expected that all refiners (and

discriminating sellers generally) will seek to avoid this Court's holding in *Hasbrouck* through this "meeting competition" artifice if Mobil's attempt is successful.

II. MOBIL'S MEETING COMPETITION DEFENSE IS NOT ESTABLISHED UNDER THE FACTS OF THIS CASE.

A party asserting the good faith meeting competition defense of 15 U.S.C. §13(b) has the burden of proof as to the existence of the defense. *Falls City Industries v. Vanco Beverage*, 460 U.S. 428, 438, 451 (1982). A discriminating seller must meet its burden of proving that it was possessed of facts based upon which it reasonably believed it was meeting the actual lower price of a competitor that was available to its favored buyer. *U.S. v. U.S. Gypsum*, 438 U.S. 422, 451 (1978).

In determining whether or not the meeting competition defense properly applies to an area-wide pricing system (such as Mobil used here), a discriminating seller must provide actual evidence to prove that it believed that the lower prices it charged to buyers were genuinely available to those buyers from its

competitors, throughout the territory, and throughout the period the lower prices were made available. *Falls City Industries, supra,* at 451. Mere vague assertions by a seller that it always sets prices so it is generally competitive in the market are insufficient. Where a discriminating seller has asserted a desire to meet competition generally, without reference to specific competitive price offers, the Courts and the Federal Trade Commission have rejected the meeting competition defense. *See, e.g. Rabiner & Jonstow, Inc. v. F.T.C.*, 386 F.2d 667, 671 (2d Cir. 1967), *cert. den.* 390 U.S. 1004 (1968); *Exquisite Form Brassiere, Inc. v. F.T.C.*, 360 F.2d 492, 493 (D.C. Cir. 1965), *cert. den.* 384 U.S. 959 (1966); *Foremost Dairies, Inc. v. F.T.C.*, 62 F.T.C. 1344, 1352 (1963), *aff'd* 348 F.2d 674 (5th Cir.), *cert. den.* 382 U.S. 959 (1965).

Where the only evidence adduced to support a claimed meeting competition defense is given by witnesses who are without personal knowledge of the transactions in question, and is limited to statements of

each witnesses' assumption or conclusion that the price discriminations were justified generally by competition, such evidence is insufficient to support a meeting competition defense. *Corn Products Refining Company v. F.T.C.*, 324 U.S. 726, 741 (1945).

Neither may a seller merely "bootstrap" itself into the protections of the meeting competition defense. Therefore, the law does not permit a seller to maintain an otherwise unlawful system of discriminatory prices merely because that pricing system has been adopted as a means of securing the benefits of a like unlawful system maintained by competitors. *Falls City Industries, supra,* at 440-441; *F.T.C. v. A.E. Staley Manufacturing Company*, 324 U.S. 1943 (1945).

Herein, Mobil has failed to identify any competitors, failed to identify any competitive offers, failed to identify any competitive prices which may have been available to its favored buyer at any point in time, and has conceded that it has never lost a distributor within the State of Connecticut to a competitor.

January 18 Tr. at 126.

Mobil's discriminatory pricing "system"[7] is therefore merely an attempt to perpetuate the discriminatory pricing system condemned by this Court in *Texaco v. Hasbrouck, supra*, and earlier in *Perkins v. Standard Oil Company of California supra*, under the guise of a meeting competition defense.[8]

Also, Mobil's evidence regarding its meeting competition defense was limited to unidentified "competition" claimed by Mobil to exist at the distributional/wholesale level. This was consistent with Mobil's claim that Aldin was a distributor, not a retailer. However, the jury found that Aldin was a *retailer, not a wholesaler.* Because Mobil has presented

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[7] A system whereby petroleum refiners throughout the industry charge those whom they arbitrarily categorize as "distributors" significantly lower prices than are charged to those categorized as "retailers".

[8] As was the case in both *Hasbrouck* and *Perkins*, the substantial discounts provided by Mobil to Aldin had nothing to do with any functions performed by Aldin, or to the value of any such functions.

no evidence whatsoever of competitive offers or competitive conditions regarding its "retail class of trade" purchasers (including Aldin), even the meager opinion evidence which Mobil did present was rendered irrelevant by the jury's finding.

Mobil's meeting competition defense was therefore unsupportable, and Tolokan's Motion for a Directed Verdict regarding that defense should have been granted, and the defense withdrawn from consideration by the jury. In failing to do so the District Court undermined the presumption of injury applicable in antitrust cases such as this and, consequently, Tolokan's right to recovery.

III. ANTITRUST INJURY IS PRESUMED TO HAVE OCCURRED WHERE COMPETITION IS KEEN, PROFIT MARGINS ARE SMALL, THE DISCRIMINATION IS RELATIVELY LARGE AND ADMITTED TO BE COMPETITIVELY SIGNIFICANT, AND THE DISCRIMINATION HAS EXISTED CONTINUALLY FOR MANY YEARS.

Tolokan and Aldin competed in the highly competitive retail gasoline marketplace where profits and margins were low, and pricing differences of a

penny or two were significant. The proven discrimination, averaging five cents per gallon over the damages period, was admitted by Mobil's expert to be "competitively significant". This proven substantial discrimination existed during the entire damages period from 1981 through 1988, ranging at times to as high as twenty-six cents per gallon. (P. Ex. 15, Prices of March 8, 1986.) Additionally, the jury found that competition had been injured, and that Tolokan and Aldin were in competition with each other. Where such a situation exists, the antitrust laws require that the existence of damages to a disfavored competitor be presumed. *Texaco, Inc. v. Hasbrouck, supra*, at 2551; *see also, F.T.C. v. Morton Salt*, 334 U.S. 37, 50 (1948), holding it to be "self evident" that injury occurs where manufacturers sell to some buyers substantially cheaper than to competing customers.

Additionally, where profits available to competitors are at a variance as a result of the discrimination, the evidence is sufficient to support a "just and reasonable

inference" of injury from proof of a defendant's wrongful acts and their tendency to injure plaintiff's business. *J. Truett Payne, Inc. v. Chrysler Motors Corporation*, 451 U.S. 557, 566 (1981) citing: *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), awarding damages based on a comparison of profits available to a disfavored purchaser with profits available to a favored purchaser; *see also, Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-379 (1927); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 561-566 (1931).

Because of the higher prices charged to him by Mobil, and as a matter of competitive necessity, Tolokan sold gasoline at full service (with resulting increased overheads) at, or below, the price which Aldin charged for self-service. Had Tolokan been afforded the pricing and profit opportunities Mobil afforded to Aldin, he could have lowered his price, generated additional profits and capital, modernized his facility, installed self-service equipment and new tanks,

etc., and thereby have become much more competitive and profitable. (January 11, 1991 Tr. at 67-72, 83-84; January 16, 1991 Tr. at 18-22; 186.)

Tolokan's expert confirmed the existence of competitive injury to Tolokan attributable to the discrimination, and reviewed the three alternative methods used by him to quantify Tolokan's damages. The expert (Economist Dr. Ronald Cotterill) opined that the comparison group method calculation, resulting in the most conservative damage figure of $425,587.42, was the preferable quantification method, since it required the fewest assumptions. (January 16 Tr. 34, 44-47, 181-182, 188; January 17 Tr. 33-48; Ex. 20.)

In such a case, where a buyer shows the price paid by him has been discriminatorily high, and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of *Clayton §4. Hanover Shoe v. United Machinery Corp,* 392 U.S. 481, 489 (1968).

IV. THE JURY'S FINDING REGARDING ANTITRUST INJURY TO TOLOKAN IS IRRECONCILABLE WITH ITS OTHER FINDINGS, MOBIL'S ADMISSION THAT THE DISCRIMINATION WAS COMPETITIVELY SIGNIFICANT, AND WITH THE PRESUMPTION AND PROOF OF ANTITRUST INJURY UNDER THE FACTS OF THIS CASE.

The jury found that Mobil's prices to Tolokan were discriminatory (Verdict Form, App. B, Question 1), that Tolokan and Aldin were in competition with each other (Question 2), and that, as a result, competition may have been harmed. The jury was then to determine whether ". . . *Mr. Tolokan was injured in a way that violates the antitrust law by Aldin paying a lower price for gasoline?*" The jury responded, "*No*"

However, this finding is logically irreconcilable with the jury's prior findings that competition was harmed as a result of the substantially different prices charged to Tolokan and to Aldin by Mobil, and that Tolokan and Aldin were in actual competition. Tolokan was certainly more directly in competition with

Aldin than were any other competitors since Tolokan and Aldin sold identical products to the public under the same "Mobil" tradename.

The jury's finding also contradicts the clear presumption of injury where competition is keen, profit margins are small, and the discrimination is large and has existed continuously for many years. Additionally, Mobil's own expert conceded that the discrimination was "competitively significant". Finally, Tolokan's expert evidence of injury, and quantification of that injury, was uncontradicted.

The only logical explanation for this contradiction in the jury's findings is that the jury was erroneously allowed to consider Mobil's unsupportable meeting competition defense. It was clear from the Court's instructions that, if the jury found the meeting competition defense to exist, the jury was to find that Mobil could not have violated the antitrust laws. The Court instructed the jury as follows in that regard:

> *"Defendant may, nevertheless, exonerate itself from liability by demonstrating by a*

preponderance of the evidence that its decision to charge Aldin a lower price was to meet competition." (E.R. p. 51, lines 3-7);

"*If you find that Mr. Tolokan has suffered an antitrust injury as a result of a violation of the antitrust laws and that Mobil has not proved that meeting the competition defense or the cost justification defense is available to them, the law provides that Mr. Tolokan should be fairly compensated for all damages to his business . . . .*" (E.R. p. 53, lines 17-24);

"*But you should also remember that you can compensate Mr. Tolokan only for antitrust injuries caused by a violation of the antitrust laws.*" (E.R. p. 54, lines 17-20). Emphasis added.

The Court therefore clearly instructed the jury that if Mobil established the defense of meeting competition it would have "exonerated itself" from antitrust liability, and that Tolokan could only be compensated for antitrust injuries caused by a *violation* of the antitrust laws.[9]

Having improperly found that Mobil's

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[9] The District Court further instructed the jury: "*You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.*" E.R. 30, lines 5-7, *see also*, E.R. 32-33, lines 23-2.

discriminatory prices to Aldin were to meet competition, and having been instructed by the Court that Mobil had thereby exonerated itself from antitrust liability, it cannot logically be expected that the jury would have found that Tolokan had been injured in a way that *violated* the antitrust laws.

Conversely, had the Court properly removed the meeting competition defense from the consideration of the jury, and directed that such a defense was not available, nor to be considered, the jury's findings regarding Questions 1 through 4 would have allowed the appropriate determination by the jury as to whether or not Tolokan had been injured, i.e. was Tolokan damaged because he was required to pay an average of five cents more per gallon than was his competitor one mile away for nine years? Neither the jury nor Tolokan were afforded this opportunity as a result of the District Court's failure to withdraw the unsupportable meeting competition defense from the consideration of the jury.

In its affirming Opinion the Court of Appeals cites

to one portion of the Court's instructions regarding antitrust injury and affirmative defenses. However, in doing so it ignores completely the fuller content of the instructions clearly instructing the jury to *exonerate* Mobil of any antitrust violation if the meeting competition defense were sustained. The Appeals Court's finding that there was no basis for believing that the jury's finding of no antitrust injury was unduly influenced by the submission of the meeting competition defense is illogical, contrary to the jury's finding of competitive injury, contrary to the uncontradicted presumption of injury under the facts of this case, and contrary to Tolokan's uncontradicted evidence establishing and quantifying his damages. What the Court of Appeals is essentially saying is that the jury should have found that Mobil violated the antitrust laws, thereby injuring Tolokan, despite the fact that the jury had been instructed that Mobil was exonerated from any violation because of the meeting competition defense. Such a holding is illogical and

erroneous.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari be granted.

Dated this 6th day December, 1991.

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Counsel of Record and Attorney for Petitioners

91-993 (2)

Supreme Court, U.S.
FILED
DEC 11 1991
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Writ of Certiorari In The United States Court of Appeals for the Second Circuit

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 16th day of September, one thousand nine hundred and ninety-one.

PRESENT: Honorable J. Edward Lumbard,
Honorable Jon O. Newman,
Honorable George C. Pratt,
Circuit Judges.

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S MOBIL SERVICE STATION and J & M, INC.,

Plaintiff-Appellant,

v. 91-7360

MOBIL OIL CORPORATION,

Defendant-Appellee.

ORDER

Appeal from the United States District Court of Connecticut (T. Emmet Clarie, Judge).

This cause came onto be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Michael Tolokan appeals from the January 25, 1991, judgment holding, following a jury trial, that defendant was not liable under the Robinson-Patman Act, 15 U.S.C. § 13, and its state law counterpart, Conn. Gen. Stat. §§ 35-45.

Tolokan has no cause of action under the statute because the jury found that he lacked the requisite antitrust injury. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (plaintiff must make some showing of actual antitrust injury to sue under the act). Tolokan contends that the jury's findings of no antitrust injury was tainted by the District Court's erroneous submission of the meeting competition defense to the jury. Tolokan argues that because the jury improperly considered and found, in special interrogatory number six, that Mobil's prices were set to meet competition, a finding that necessarily exonerated Mobil of a violation of the antitrust laws, the jury was constrained to find, in special interrogatory number five, that Tolokan had not been injured in a way that violated the antitrust laws.

We need not reach the question of whether the meeting competition defense was properly submitted. The District Judge clearly explained the logical order of the issues presented for resolution and instructed the jury to decide the issue of antitrust injury before going on to consider affirmative defenses: "If the Plaintiff proves by a preponderance of the evidence that he suffered antitrust injury, then you still need to consider whether Mobil has established an affirmative defense to the violation." There is no basis for believing that the jury's finding of no antitrust injury was unduly influenced by the submission of the meeting competition defense, and that finding

independently precludes recovery by Tolokan. The District Judge simply acted sensibly in securing from the jury a finding on the meeting competition defense, as an alternative ground for judgment.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL TOLOKAN, JR. :

vs. : Civil No.
N 82-106(TEC)

MOBIL OIL CORPORATION :

VERDICT FORM

1. Did the defendant, Mobil Oil Corporation charge the plaintiff, Michael Tolokan, a higher price for Mobil gasoline than it charged Aldin for Mobil gasoline? Yes ✓ No ___

2. Between 1981 and 1988, was Mr. Tolokan's station in competition with Aldin's station for purchasers of gasoline? Yes ✓ No ___

3. Were Mr. Tolokan and Aldin at the same functional level, that is, were they both retailers? Yes ✓ No ___

4. If your answers to questions 1, 2, and 3 are Yes, do you find that competition may have been harmed as a result of the different prices charged to Mr. Tolokan and to Aldin by Mobil? Yes ✓ No ___

5. Do you find that Mr. Tolokan was injured in a way that violates the antitrust laws by Aldin paying a lower price for gasoline? Yes___ No_✓_

6. Was the lower price offered to Aldin by Mobil to meet the equally low price offered by Mobil's competitors? Yes_✓_ No___

7. Was the lower price offered to Aldin by Mobil cost justified? Yes___ No_✓_

If your answer to questions 1-5 is yes and your answer to 6 and 7 is no, you should return your verdict for Mr. Tolokan, and then you should consider the next question. If your answer to any question from 1-5 is no, or your answer is yes to either 6 or 7 you should return your verdict for Mobil.

VERDICT:

___ Mr. Tolokan _✓_ Mobil

8. Do you find that Mr. Tolokan was damaged by Mobil? Yes___ No___

If your answer to question 8 is "yes", what is the amount of his damages? _____

/s/ Michael Daugherty

Dated: January 24, 1991

APPENDIX C

15 U.S.C. §13: Discrimination in price, services, or facilities -- Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in great quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce: and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce in selecting their own customers in bona fide transactions and no in restraint of trade: *And provided further*, That

nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . : Provided however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

APPENDIX D

Clayton Act Sec. 4 (15 U.S.C. § 15): Treble Damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX E

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59. New Trials; Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served no later than 10 days after entry of the judgment.

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

(3)

No. 91-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL TOLOKAN, JR., Individually and Doing Business as JOE AND MIKE'S SERVICE STATION, and J & M, INC.,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this Robinson-Patman Act case, petitioner relied only on evidence of an alleged "overcharge" to demonstrate antitrust injury and took no exception to the trial court's instructions to the jury on the law of antitrust injury. The jury returned a verdict for respondent, finding that petitioner suffered no antitrust injury and that respondent's prices were a lawful response to competition.

1. Under these circumstances, was the Second Circuit correct in holding that "[t]here is no basis for believing that the jury's finding of no antitrust injury was unduly influenced by submission of the meeting competition defense?"

PARTIES BELOW

Respondent Mobil Oil Corporation agrees with the list of parties cited in the petition for certiorari. Pursuant to Rule 29.1, respondent's listing of subsidiaries and affiliates appears in the appendix to this brief in opposition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-993

MICHAEL TOLOKAN, JR., Individually and Doing Business as JOE AND MIKE'S SERVICE STATION, and J & M, INC.,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Mobil Oil Corporation respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

Respondent Mobil Oil Corporation agrees with the citation of opinions below contained in the petition for certiorari.

JURISDICTION

Respondent Mobil Oil Corporation agrees that the judgment of the court of appeals was entered on September 16, 1991. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Three statutory provisions are addressed by the petition: Sections 2(a) and 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(a)-(b), are quoted in Appendix C to the petition for certiorari; Section 4 of the Clayton Act, 15 U.S.C. § 15, is quoted in Appendix D to the petition for certiorari. Although the petition references Rules 50 and 59 of the Federal Rules of Civil Procedure, it makes no substantive argument based on those provisions.

STATEMENT OF THE CASE

This case concerns allegations of price discrimination between February 21, 1981 and September 2, 1988. Petitioners Michael Tolokan, Jr., individually and doing business as Joe and Mike's Service Station, and J & M, Inc. (collectively "Tolokan" or "petitioner"), brought suit alleging that respondent Mobil Oil Corporation ("Mobil") charged a gasoline distributor, Aldin Associates Limited Partnership ("Aldin"), a lower price for Mobil brand gasoline in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and its state-law counterpart, Conn. Gen. Stat. § 35-45.

1. *Procedural Background.* The matter was tried to a jury before Judge T. Emmet Clarie of the United States District Court for the District of Connecticut between January 9 and January 24, 1991. Responding to special interrogatories, the jury returned a verdict for Mobil on two independent grounds. First, the jury found that Mobil was not liable to Tolokan because its pricing had not caused Tolokan antitrust injury. Second, the jury found that even if Tolokan had a cause of action, Mobil was not liable because its lower price to Aldin was a good faith effort to meet competition. The trial court entered judgment for Mobil in accordance with the jury's verdict. Tolokan filed timely motions for judgment notwithstanding the verdict and new trial on February 4,

1991. The trial court denied those motions the following day without opinion.

Tolokan appealed the trial court's judgment to the United States Court of Appeals for the Second Circuit. Although he purported to raise several issues on appeal, he framed only two basic arguments. First, he contended that the meeting competition defense was improperly submitted to the jury. Second, he argued that the jury's consideration of the meeting competition defense tainted its response to the antitrust injury question. The court of appeals heard oral argument in the case on September 10, 1991. In less than a week, that court issued an unpublished *per curiam* opinion affirming the judgment for Mobil. The court found it unnecessary to address any of Tolokan's questions on the meeting competition defense because "[t]here is no basis for believing that the jury's finding of no antitrust injury was unduly influenced by submission of the meeting competition defense, and that finding independently precludes recovery by Tolokan." *See* Pet. for Cert. App. A at 3-4. Tolokan has now filed a petition for certiorari seeking this Court's review of the Second Circuit's judgment.

2. *Record at Trial.* From 1965 until September 2, 1988, Tolokan owned and operated a service station on the Post Road in Guilford, Connecticut. Trial Transcript ("Tr.") (Jan. 10, 1991) at 75-85 (Testimony of M. Tolokan). During the period that he operated the station, Tolokan had successive supply contracts with Mobil and sold gasoline under the Mobil brand name. Tr. (Jan. 10, 1991) at 129 (Testimony of M. Tolokan). These contracts generally lasted for three years and could be terminated by Tolokan upon reasonable notice. During the damage period, held by the trial court to be February 21, 1981 through September 2, 1988,[1] Tolokan never termi-

[1] Ruling on Defendant's Motion for Summary Judgment, *Tolokan v. Mobil Oil Corp.*, Civil No. N-82-106 (TEC), slip op. at 6-8 (D. Conn. June 20, 1990).

nated his supply contract with Mobil. To the contrary, he renewed his supply agreement on July 1, 1981, July 1, 1984, and again in 1988. Tr. (Jan. 10, 1991) at 155-58 (Testimony of M. Tolokan); Tr. (Jan. 10, 1991) at 10-11 (Testimony of J. Schultz).

Pursuant to these contracts, Tolokan purchased gasoline, which Mobil delivered to his station, at Mobil's posted Dealer Tankwagon ("DTW") price on the date of delivery. Tr. (Jan. 9, 1991) at 48-49 (Testimony of J. Schultz). Tolokan's net price for gasoline, however, was actually less than the DTW price. At virtually all times, Mobil gave Tolokan a "competitive allowance" or rebate of between 1½ and 2½¢ per gallon. Tr. (Jan. 10, 1991) at 40-47, 63-69 (Testimony of J. Schultz); Tr. (Jan. 10, 1991) at 134 (Testimony of M. Tolokan). Mobil also made lump sum payments of $50,000 and $35,000 to Tolokan for station improvements. Tr. (Jan. 10, 1991) at 222-28 (Testimony of M. Tolokan). Tolokan did not repay these monies directly. Rather, he "repaid" Mobil by buying certain quantities of gasoline over time. Mobil reduced Tolokan's outstanding debt on a cents per gallon basis for each of Tolokan's purchases. Tr. (Jan. 17, 1991) at 137-39 (Testimony of J. Schultz). Mobil gave Tolokan these competitive allowances and lump sum payments in response to competitive circumstances and in order to retain his business. Tr. (Jan. 10, 1991) at 66 (Testimony of J. Schultz); Tr. (Jan. 17, 1991) at 136-37 (Testimony of J. Schultz). In a real sense, then, independent service station owners, such as Tolokan, were in the "catbird seat," able to play off distributors against refiners and vice versa in search of the best package of discounts and lump sum payments available. Tr. (Jan. 15, 1991) at 8-9 (Testimony of D. Savin).

In addition to selling delivered product at its DTW price, Mobil also sold gasoline at its terminal, or "rack," at a price that was generally lower than its DTW price. Tr. (Jan. 10, 1991) at 7-8 (Testimony of J. Schultz). Customers buying at the rack supplied product to multiple

stations. Historically such customers have been referred to in the oil industry as "distributors," "jobbers," or "wholesalers," even though many of them are vertically integrated and sell some or all of their product through their own retail outlets. *See Standard Oil Co. v. FTC*, 340 U.S. 231, 234-36 (1951); *see also* Plaintiff's Exhibit ("Pl. Ex.") 15 (referring to Mobil's "jobber" price); Tr. (Jan. 18, 1991) at 69-70 (Testimony of S. Pryor); Tr. (Jan. 17, 1991) at 178-80 (Testimony of J. Schultz). Contrary to Tolokan's assertions, Mobil did not "unilaterally" determine who was a "distributor." Tr. (Jan. 18, 1991) at 92-94, 108 (Testimony of S. Pryor). Rather, competitors' offers to sell gasoline to a customer at a rack price determined, from Mobil's perspective, whether that customer was a "distributor" who must be offered Mobil's rack price in order to obtain or retain that customer's business.[2] Mobil competed for distributor business with other major oil companies who also had dealers, as well as with independent oil companies who sold only to distributors at the rack. Tr. (Jan. 18, 1991) at 81-86 (Testimony of S. Pryor).[3]

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[2] Although Tolokan asserts that Mobil's classification of customers as distributors or dealers is "arbitrary," it is "competition that determines whether a customer receives a tank wagon price or rack price." Tr. (Jan. 18, 1991) at 67-68 (Testimony of S. Pryor). If a Mobil customer operates as an individual service station, the market sets a price for that business, and Mobil establishes its prices "very much in line" with the market. *Id.* at 68. On the other hand, if a Mobil customer establishes itself as a gasoline distribution company, as Aldin did, "the market bids distributor prices for that kind of customer." *Id.*

[3] Before December 1982, Mobil's distributor price was a fixed differential off its DTW price. Tr. (Jan. 18, 1991) at 78-79 (Testimony of S. Pryor). Thus, the distributor price moved only when there was a change in Mobil's DTW price or when a competitor offered a larger discount. With the emergence of independent suppliers, such as A-1, Tenneco, Ashland, and Citgo, who sold only at the rack to distributors, fixed differential pricing ceased to be competitive in 1982. Tr. (Jan. 18, 1991) at 81-83, 113-14 (Testimony of S. Pryor). In response to this competition, Mobil, in 1982, inde-

Mobil established its rack and DTW prices on a daily basis in response to competition. From trade services, such as the Oil Price Information Service and the Lundberg Survey, Mobil knew the competitive rack offerings available in the market. Tr. (Jan. 18, 1991) at 76-78, 86-90 (Testimony of S. Pryor); *see* Tr. (Jan. 17, 1991) at 126 (Testimony of J. Schultz). In order to compete for distributor business, Mobil reviewed these published rack prices and independently set its rack price to be competitive in the market. Tr. (Jan. 18, 1991) at 76-78, 86-90 (Testimony of S. Pryor); Tr. (Jan. 17, 1991) at 132-36 (Testimony of J. Schultz). In fact, Mobil had no choice but to be competitive at the rack if it wished to maintain sales to distributors. Steven Pryor, then Mobil's General Manager of Planning and Financial Analysis for United States Marketing, testified:

> Q: What is it that causes you to believe that you don't have a choice, that you have to give your distributors a competitive rack price?
>
> A: . . . [A]ll of our distributors are supplied by multiple suppliers, all of whom give them a rack price, and the prices that they are charged are published every day in the industry. . . . So it is absolutely clear that if I don't give them a distributor price in turn, I would not have their business. That is the way the industry works.

Tr. (Jan. 18, 1991) at 89-90. Likewise, to attract and retain direct-serve dealer business, Mobil reviewed DTW prices available in the same publications and offered a competitive delivered price. As discussed above, Mobil responded to individual competitive circumstances with discounts and lump sum payments. Tr. (Jan. 18, 1991)

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pendently abandoned its fixed differential and established its own "rack price" in response to competitor prices for distributor business. Tr. (Jan. 18, 1991) at 85-86 (Testimony of S. Pryor). Since that time, Mobil's rack price and DTW price have been established independently of one another based on the separate competition for distributor/rack business and direct-serve dealers. *Id.*; Tr. (Jan. 18, 1991) at 27-28 (Testimony of J. Schultz).

at 71 (Testimony of S. Pryor); Tr. (Jan. 17, 1991) at 136-40 (Testimony of J. Schultz).

Aldin Associates Limited Partnership purchased gasoline from Mobil at the rack. Aldin was formed in 1982 by Cantro Petroleum Corporation ("Cantro"), Aldin's general partner, to acquire certain service station properties owned by Lehigh Oil Company ("Lehigh"). Tr. (Jan. 11, 1991) at 128-34 (Testimony of D. Savin). Before forming Aldin, Cantro supplied gasoline to approximately 40 independently owned service stations. The approximately 45 stations Cantro acquired through Aldin from Lehigh were operated directly by Aldin at retail. Tr. (Jan. 11, 1991) at 141-43 (Testimony of D. Savin). During the damage period Aldin had supply contracts with Mobil, Citgo, and Sunoco. Tr. (Jan. 11, 1991) at 203-06 (Testimony of D. Savin). Aldin also purchased gasoline on a noncontract basis from Hess, Northeast, Drake, and "probably two or three others." Tr. (Jan. 11, 1991) at 151-52 (Testimony of D. Savin). About 40 of the total number of stations supplied by Aldin and Cantro operated under the Mobil flag. Tr. (Jan. 11, 1991) at 202-03 (Testimony of D. Savin); Tr. (Jan. 10, 1991) at 22-23 (Testimony of J. Schultz). The remaining stations operated under other brands or were unbranded. Legally, Aldin could sell only Mobil gasoline in Mobil branded stations. However, it could sell any gasoline, including Mobil, in its unbranded stations. Tr. (Jan. 11, 1991) at 204-05 (Testimony of D. Savin); Tr. (Jan. 17, 1991) at 116-17 (Testimony of J. Schultz); Tr. (Jan. 15, 1991) at 7 (Testimony of D. Savin).

When Cantro formed Aldin and acquired the Lehigh stations, Cantro's president, David Savin, advised Mobil that Aldin would terminate Lehigh's supply agreement with Mobil unless Mobil's fixed differential off its DTW price matched that being offered by Mobil's competitors. Tr. (Jan. 15, 1991) at 25-27 (Testimony of D. Savin); *see* Defendant's Exhibit ("Def. Ex.") KKK. Shortly

thereafter, as discussed above, *see supra* note 3, Mobil switched from fixed differential pricing to an independently determined rack price that was responsive to competition on a daily basis. Tr. (Jan. 15, 1991) at 29-30 (Testimony of D. Savin); *see* Tr. (Jan. 18, 1991) at 85-86 (Testimony of S. Pryor). Thus, there was no longer any need for Aldin to request that Mobil match a competitor's fixed differential.

Throughout the damage period, Aldin paid all of its suppliers their respective rack prices. Tr. (Jan. 15, 1991) at 20-21 (Testimony of D. Savin). Mobil's competitors constantly solicited Aldin's business, always offering their rack prices. Tr. (Jan. 15, 1991) at 22-23 (Testimony of D. Savin). Aldin's position on price was consistent and known to Mobil—if Mobil's price were not competitive with other rack prices, Aldin would take its business elsewhere. Tr. (Jan. 15, 1991) at 30-31 (Testimony of D. Savin). Since nothing prevented Aldin from terminating its supply contract with Mobil, Mobil could not treat Aldin's statement as an idle threat. Tr. (Jan. 15, 1991) at 27-28 (Testimony of D. Savin); Tr. (Jan. 17, 1991) at 114 (Testimony of J. Schultz). Moreover, for its unbranded stations, Aldin could buy at the rack from whomever offered the best price. Tr. (Jan. 11, 1991) at 204-05 (Testimony of D. Savin); *see* Tr. (Jan. 11, 1991) at 116-17 (Testimony of J. Schultz).[4]

Among the stations Aldin acquired from Lehigh was a Mobil branded station located over one mile east of the Tolokan station on the Post Road in Guilford, Connecticut. Tr. (Jan. 11, 1991) at 138 (Testimony of D. Savin). Mobil had no separate relationship with that or any other station supplied by Aldin. Mobil did not

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[4] Tolokan, in contrast, never received an offer to purchase gasoline at the rack from a Mobil competitor. Thus, Mobil could not offer Tolokan its rack price as a good faith response to competition. *See* Tr. (Jan. 18, 1991) at 50 (Testimony of J. Shultz).

deliver gas directly to that station. Nor did its marketing representatives make calls on any individual Aldin station. *See* Tr. (Jan. 17, 1991) at 111-12 (Testimony of J. Schultz); Tr. (Jan. 11, 1991) at 208-11 (Testimony of D. Savin). Instead, Mobil made all sales calls on Aldin at its headquarters. Any special promotions or other programs suggested by Mobil were implemented at Aldin's individual locations, if at all, through an Aldin representative who dealt with the particular station. Tr. (Jan. 17, 1991) at 149-54 (Testimony of J. Schultz); Tr. (Jan. 11, 1991) at 208-11 (Testimony of D. Savin).

Aldin has operated its Guilford station since December 1982, selling gasoline at self-service only. Tr. (Jan. 11, 1991) at 177-78 (Testimony of D. Savin). Because this station is the first off exit 59 on Interstate 95, Aldin consistently pursued a high-price/low-volume strategy during the damage period. Tr. (Jan. 11, 1991) at 169-70, 188-89 (Testimony of D. Savin). Given this proximity to transient highway traffic, Aldin charged the highest possible price without regard to prices charged at other Guilford stations. Tr. (Jan. 15, 1991) at 36-41 (Testimony of D. Savin); Tr. (Jan. 11, 1991) at 187-89 (Testimony of D. Savin). At virtually all times during the relevant period, Aldin's self-service pump price at that station was higher than the pump price for Tolokan's full-service gasoline. *See* Pl. Ex. 16; Tr. (Jan. 11, 1991) at 38-39, 48 (Testimony of M. Tolokan). Not surprisingly, given Aldin's pricing strategy, Tolokan lost no sales to the Aldin station as a result of Aldin receiving a lower price from Mobil; nor was Tolokan forced to reduce his profit margin in order to compete with Aldin's Guilford location. *See* Tr. (Jan. 11, 1991) at 49-51, 61-67 (Testimony of M. Tolokan).

At trial Tolokan did not contend that Mobil's lower price to Aldin injured him. Nor did he contend that Aldin used its lower price to gain any competitive advantage. Tr. (Jan. 11, 1991) at 61-67 (Testimony of M.

Tolokan); Tr. (Jan. 17, 1991) at 30-32 (Testimony of petitioner's expert, Dr. R.W. Cotterill); *see* Tr. (Jan. 16, 1991) at 148-50 (Testimony of Dr. R.W. Cotterill) (Aldin chose not to compete on price); Tr. (Jan. 15, 1991) at 109-10 (Testimony of D. Savin) (Aldin did not seek to pass cost savings through to the consumer in order to increase market share). Rather, Tolokan contended, "I was overcharged by Mobil." Tr. (Jan. 11, 1991) at 64 (Testimony of M. Tolokan).

> Q: So, in this case, what you have decided is that to the extent Mr. Tolokan has been injured, it is injury [that] resulted to him from the overcharge?
>
> A: Yes sir, that's correct.

Tr. (Jan. 16, 1991) at 183 (Testimony of Dr. R.W. Cotterill). Tolokan argued that this alleged overcharge was his antitrust injury. He measured that injury in an amount equal to the difference between Mobil's rack and DTW prices times the quantity of gasoline he purchased, Tr. (Jan. 11, 1991) at 67-78 (Testimony of M. Tolokan); Tr. (Jan. 16, 1991) at 178-92 (Testimony of Dr. R.W. Cotterill), and claimed damages of $425,587.42.[5]

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[5] Although Tolokan's petition suggests that he presented three damage estimates, *see* Pet. for Cert. at 12 n.6, in fact, he only presented one damage calculation to the jury. His expert, Dr. Ronald W. Cotterill, flatly stated that the $889,000 figure mentioned in the petition was not a valid calculation. Tr. (Jan. 17, 1991) at 43-45 (Testimony of Dr. R.W. Cotterill). Dr. Cotterill also stated that the $462,000 figure cited in Tolokan's brief was based on numerous assumptions and was therefore less accurate than the damage estimate actually presented. Tr. (Jan. 16, 1991) at 177-83 (Testimony of Dr. R.W. Cotterill); Tr. (Jan. 17, 1991) at 62-63 (Testimony of Dr. R.W. Cotterill). Tolokan's suggestion that the jury had before it damage estimates other than the amount of the alleged price discrimination times gallons purchased is, therefore, inaccurate and misleading.

After deliberating approximately 4 hours over a two-day period, the jury returned a verdict for Mobil. In response to special interrogatories submitted by the court, the jury found that Mobil had charged Aldin and Tolokan different prices for gasoline of like grade and quality. The jury also found that, whereas the price differential threatened injury to competition, Tolokan had, in fact, not suffered antitrust injury. *See* Pet. for Cert. App. B, Special Interrogatory 5. That finding alone precluded Tolokan from recovering damages. The jury then considered Mobil's affirmative defenses and found that Mobil's price to Aldin was a lawful response to competition under section 2(b) of the Robinson-Patman Act and section 35-45(b) of the Connecticut Antitrust Act. *See id.*, Special Interrogatory 6.

As previously noted, Tolokan's post-trial motions were denied the day after they were filed. The Second Circuit affirmed the judgment for Mobil in a *per curiam* opinion issued less than a week after oral argument. Tolokan did not seek rehearing or suggest rehearing en banc. He filed his petition for certiorari on December 11, 1991.

REASONS FOR DENYING THE WRIT

I. THE JURY'S VERDICT IN THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW.

Contrary to Tolokan's presentation, the starting point for addressing his petition is the jury's verdict finding no antitrust injury. To recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, a Robinson-Patman plaintiff must prove that he suffered harm "of the type the antitrust laws were designed to prevent and that flows from that which makes defendant['s] acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Tolokan failed to carry that burden. The jury's finding against him on the antitrust injury issue is dispositive, and independently supports the judgment for Mobil. Thus, unless Tolokan's petition presents a reviewable question on the issue of antitrust injury, which it clearly does not, this Court should not grant certiorari. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-63 (1981); *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1887 (1990) (without antitrust injury, private antitrust plaintiff has no cause of action).

A. This Case Presents No Substantive Legal Question on Antitrust Injury.

Tolokan's petition presents a threshold question on the antitrust injury verdict: Did the Second Circuit correctly hold that the jury's antitrust injury verdict was not unduly influenced by submission of the meeting competition defense? [6]

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[6] Tolokan's petition also asserts that antitrust injury can be presumed in this case because the jury found that the price difference at issue might injure competition. To the extent he offers this as an independent basis for review, it contradicts several decisions of this Court and can be summarily dismissed. Tolokan's argument confuses two separate concepts: injury to competition, which is an element of a prima facie claim under section 2(a) of the Robinson-

That question plainly does not merit this Court's review. On its face, it raises no substantive legal issue. Further, Tolokan does not explain why the question concerns an important issue of federal law needing resolution by the Court. Indeed, it is inconceivable that he could do so. This issue is not likely to arise in other cases. Nor is the Second Circuit's decision likely to have any effect on future litigation. Whether submission of the meeting competition defense unduly influenced the jury's antitrust injury verdict is inevitably bound up in the facts of this case. Whatever the Court's judgment might be on that discrete question, its opinion on such a narrow dispute would have virtually no application beyond this lawsuit.

Moreover, Tolokan invokes none of the other grounds for review usually noted in a petition for certiorari. He identifies no conflict in the circuits on this issue. He does not even challenge the legal standards the trial court used in instructing the jury on antitrust injury. In fact, he took no exception whatsoever to the trial judge's articulation of the law of antitrust injury. He now asks this Court to pierce the jury verdict in order to search for some hint that the finding on antitrust injury—a critical element of his case—was somehow tainted by submission of an affirmative defense. In essence, he invites the Court to scour the record and to substitute its judgment for the considered and unani-

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Patman Act, 15 U.S.C. § 13(a), and antitrust injury, which is a requirement of section 4 of the Clayton Act. 15 U.S.C. § 15. Proof of the former does not permit presumption of the latter. *J. Truett Payne*, 451 U.S. at 562 ("[P]roof of a [Robinson-Patman] violation does not mean that a disfavored purchaser was actually 'injured' within the meaning of § 4."); *see also Atlantic Richfield Co.*, 110 S. Ct. at 1893-95 (plaintiff must prove antitrust injury even when competitive injury conclusively presumed under Sherman Act's per se rule); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (plaintiff in per se case under section 1 of the Sherman Act must prove antitrust injury to recover damages).

mous opinions of ten jurors and four judges. The Court has previously noted that such canvassing of the evidence is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). It should decline Tolokan's invitation to do that here.

B. No Evidence Supports Tolokan's Undue Influence Claim.

Wholly apart from the unexceptional nature of this issue, Tolokan's claim lacks substance. Without any evidence that the jury misunderstood the court's instructions concerning antitrust injury and the meeting competition defense or the order in which those distinct issues were to be considered, Tolokan attempts to manufacture jury confusion by selective and misleading quotation of the jury charge. *See* Pet. for Cert. at 24-26. His petition, however, ignores two dispositive facts. First, the verdict form required the jury to consider whether Tolokan had suffered antitrust injury (Special Interrogatory 5) before it considered whether Mobil had established the meeting competition defense (Special Interrogatory 6). *See* Pet. for Cert. App. B. The verdict form also advised the jury that a finding adverse to Tolokan on the antitrust injury question would preclude recovery. *Id.*

Tolokan challenges neither the order of the questions posed nor the legal effect ascribed to them. His argument merely speculates that the jury jumped ahead and decided the meeting competition issue and then went back to decide the antitrust injury question. He offered no evidence to support that assumption before the Second Circuit, which rejected his theory out of hand. *See* Pet. for Cert. App. A at 3 ("There is no basis for believing the jury's finding of no antitrust injury was unduly influenced by the submission of the meeting competition de-

fense. . . ."). The Second Circuit was correct in holding that petitioner's argument is, at best, speculation and in rejecting it summarily.

Second, the very jury instructions quoted by Tolokan in his petition draw a clear distinction between antitrust injury and the meeting competition defense:

> If you find that Mr. Tolokan has suffered antitrust injury as a result of a violation of the antitrust laws *and that Mobil has not proved that meeting the competition defense or the cost justification defense is available to them*, the law provides that Mr. Tolokan should be fairly compensated for all damages to his business which were a direct result or a likely consequence of the conduct you have found to be unlawful.

Tr. (Jan. 23, 1991) at 103-04; *see* Pet. for Cert. at 25. Tolokan's theory of jury confusion not only presumes the jury ignored the italicized clause of the charge, but that it also disregarded the trial court's earlier instructions:

> If the plaintiff proves by a preponderance of evidence that he suffered antitrust inquiry, then you will still need to consider whether Mobil has established an affirmative defense to the violation. However, if the plaintiff cannot prove by a preponderance of the evidence that he suffered antitrust injury, then you must return a verdict for Mobil.

Tr. (Jan. 23, 1991) at 100. As the Second Circuit found, this charge "clearly explained the logical order of the issues presented for resolution and instructed the jury to decide the issue of antitrust injury before going on to consider affirmative defenses." Pet. for Cert. App. A at 3.[7]

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[7] The Second Circuit also noted that "[t]he District Judge simply acted sensibly in securing from the jury a finding on the meeting competition defense, as an alternative ground for judgment." Pet. for Cert. App. A at 4

Having failed to preserve any substantive objection on the issue of antitrust injury, Tolokan hopes to overcome this deficiency by suggesting that the jury's verdict on this issue lacks integrity. To the contrary, the jury understood the law of antitrust injury as instructed by the trial court, applied that law to the facts as it found them, and rendered the only verdict proper in this case. Under these circumstances, Tolokan's contrived confusion does not raise an issue worthy of the Court's review.

C. Tolokan Failed to Prove Antitrust Injury as a Matter of Law.

An examination of Tolokan's evidence underscores how well the jury understood the concept of antitrust injury as it applies in Robinson-Patman Act suits. The jury reached the only conclusion that it could on this question because Tolokan's "proof" of antitrust injury failed as a matter of law.

As it applies to price discrimination cases, the law of antitrust injury is clear and not questioned by Tolokan's petition. To prove cognizable injury in a private, secondary-line suit, such as this one, a Robinson-Patman plaintiff must show: (1) the favored buyer passed through its cost savings (by lowering its resale price or offering additional services) and thereby gained competitive advantage; and (2) the favored buyer took sales from plaintiff or forced plaintiff to reduce his profit margin. *See ICC v. United States ex. rel. Campbell*, 289 U.S. 385, 390-91 (1933); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990); *see also J. Truett Payne*, 451 U.S. at 564-65. One without the other is not enough. At trial, Tolokan admitted that he could not satisfy either requirement.

Tolokan conceded that, during the entire seven-year period at issue in this case, Aldin's Guilford station consistently sold gasoline at prices well above those he charged, while offering less service. *See* Tr. (Jan. 16,

1991) at 149-50 (Testimony of Dr. R. W. Cotterill); Tr. (Jan. 11, 1991) at 38-39, 48 (Testimony of M. Tolokan). At the same time, Aldin's sales declined while Tolokan's sales increased substantially. *See* Def. Ex. H; Tr. (Jan. 15, 1991) at 44-47, 49-52 (Testimony of Dr. Savin); Tr. (Jan. 11, 1991) at 50-51 (Testimony of M. Tolokan). Accordingly, Tolokan admitted he lost no sales as a result of the lower prices charged to Aldin. Tr. (Jan. 11, 1991) at 49-51, 61-67 (Testimony of M. Tolokan); Tr. (Jan. 17, 1991) at 30-32 (Testimony of Dr. R.W. Cotterill). Without evidence that any of his customers defected to the Aldin station and unable to argue that he had to lower prices to compete with Aldin, Tolokan could not prove antitrust injury. *Cf. Alan's of Atlanta*, 903 F.2d at 1427; *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042-43 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990).

With respect to his alleged injury, Tolokan claimed only that he was "overcharged" by Mobil and that he was entitled to "automatic damages" as a result of the "overcharge."

> Q: Is it your understanding that you were injured because you were overcharged, you believe, by Mobil?
>
> A: I was overcharged by Mobil.
>
> Q: And that is the cause of your injury, being overcharged by Mobil as you understand?
>
> A: Yes.
>
> * * * *
>
> Q: Absolutely. Your ability to compete was in no way affected by Aldin deciding not to pass its so-called discount through to the consumer.
>
> A: I would say that is a fair statement.

Tr. (Jan. 11, 1991) at 64-66 (Testimony of M. Tolokan); *see also* Tr. (Jan. 16, 1991) at 183 (Testimony of Dr. R. W. Cotterill).[8]

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[8] Because *J. Truett Payne* rejected the concept of automatic damages, Tolokan used a different nomenclature. He claimed to

A price discrimination plaintiff who complains only of an overcharge has no cognizable antitrust injury.[9] The Court has long recognized the distinction between overcharge and price discrimination. Justice Cardozo gave the first and perhaps the best articulation of the conceptual difference:

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have lost "marketing flexibility." The concepts, however, are identical. Tolokan measured his lost "marketing flexibility" solely by the amount of the alleged price discrimination; there was no evidence of diverted sales or profits. He simply calculated the difference between the price he paid for gasoline and the price Aldin paid and multiplied that number by the number of gallons he purchased during the seven-year damage period. *See* Pl. Ex. 20; Tr. (Jan. 16, 1991) at 32-39 (Testimony of Dr. R.W. Cotterill).

[9] Tolokan's reliance on *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), in support of his overcharge theory displays a complete misunderstanding of the antitrust injury requirement and its relation to each of the antitrust laws. *Hanover Shoe* was a monopolization case under section 2 of the Sherman Act. 15 U.S.C. § 2. When a seller unlawfully monopolizes a market, it raises prices of the goods or services it sells above the level that would have existed in a nonmonopolized market. The price level established by the monopolist is directly "attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562. The monopolist's customers suffer injury because they must pay a premium above the price to which the Sherman Act otherwise entitles them. The so-called "monopoly overcharge" is therefore an appropriate measure of antitrust injury in a monopolization case. *See* W. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1468-69 (1985).

By contrast, the Robinson-Patman Act entitles the buyer to no specific price level. That statute simply guarantees parity—that is, the law assures the buyer that, absent certain circumstances, its competitors are not charged less for commodities of like grade and quality. The *lower* price to the favored buyer, not the higher price to the disfavored buyer, constitutes the unlawful conduct in a Robinson-Patman case. *See generally* M. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979, 992-93 (1977). Since the overcharge does not "flow[] from that which makes defendant['s] acts unlawful," *Brunswick Corp.*, 429 U.S. at 489 (1977), it cannot support a claim for treble damages under section 4 of the Clayton Act.

> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss . . . . But a different measure of recovery is applicable 'where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less.' Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages he has suffered, which may be more than the preference or less, but which, whether more or less, is something to be proved and not presumed. 'Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted.' *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*

ICC v. United States ex rel. Campbell, 289 U.S. 385, 390 (1933) (citations omitted and emphasis added). That reasoning was aptly extended to Robinson-Patman jurisprudence by the Second Circuit in *Enterprise Indus. v. Texas Co.*, 240 F.2d 457, (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), and is the rationale supporting this Court's rejection of the "automatic damages" concept in *J. Truett Payne, supra.*

At bottom, Tolokan's evidence of injury is nothing more than a reconstituted version of "automatic damages." Since that approach was squarely rejected in *J. Truett Payne* as a matter of law, the jury's finding on the antitrust injury issue was the only one it could have rightfully made. Further review of that determination is not necessary.

II. PETITIONER'S QUESTIONS ON THE MEETING COMPETITION DEFENSE ARE NOT WORTHY OF REVIEW.

A. Tolokan's Failure to Present an Antitrust Injury Question Warranting Review Makes Consideration of the Other Questions in the Petition Unnecessary.

Because Tolokan has not presented a question worthy of review with respect to the predicate issue of the antitrust injury verdict, the Court need not consider any of the other questions presented in his petition.

His petition attempts to use the meeting competition defense, an issue on which he preserved some objections, to bootstrap himself into review of the jury's antitrust injury finding. The Second Circuit saw through this thinly disguised end run. The court below correctly recognized that Tolokan's meeting competition questions could be reached only if Tolokan demonstrated that consideration of the defense affected the verdict on antitrust injury. Since it could find no support for that argument, the Second Circuit found it unnecessary to address any of Tolokan's questions on the meeting competition defense. *See* Pet. for Cert. App. A at 3 ("We need not reach the question of whether the meeting competition defense was properly submitted.").

As a matter of sound judicial practice, this Court generally refuses to consider questions presented in a petition for certiorari that were not passed on by the lower court. *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *J. Truett Payne*, 451 U.S. at 568. No reason exists for departing from that practice here. Since the Second Circuit did not rule on any substantive meeting competition question, and Tolokan has failed to raise an antitrust injury question meriting the Court's attention, the Court need go no further to dispose of his petition.

B. On the Merits, Tolokan Raises No Substantial Meeting Competition Issue.

Even if the Court were inclined to depart from its normal practice, Tolokan's claims of error regarding the meeting competition defense are not worthy of this Court's review. As with his speculation that the jury's verdict was tainted, Tolokan does not ask the Court to consider an important issue of federal law or to address a conflict among the circuits. He asks only that the Court parse the record and determine whether the jury correctly applied the law to the facts of this case. Such a request should be denied.

At bottom, Tolokan's petition raises only two basic issues. First, by reasoning that is unsupported by law, he contends that Mobil's reliance here on the meeting competition defense would somehow circumvent the Court's holding in *Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990). Tolokan's petition implicitly suggests that *Hasbrouck* prohibited Robinson-Patman defendants from raising the meeting competition defense in those dual distribution cases in which price differences are not justified on a cost or functional basis. *See* Pet. for Cert. at 14-15. This argument cannot be taken seriously. It amounts to an assertion that *Hasbrouck* worked a judicial repeal of section 2(b) of the Robinson-Patman Act. That case did no such thing, and Article III confers no such power upon the Court. *Cf. National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695-96 (1978) (judicially created exception to Sherman Act for dangerous goods and services would be "tantamount to a repeal of the statute"; policy of Sherman Act precludes judicial inquiry into whether competition is good or bad). Therefore, this ground for granting the writ can be summarily dismissed.

Second, Tolokan asserts that Mobil failed to adduce evidence sufficient to support its meeting competition defense. This theory rests on a hodgepodge of factual contentions, most of which fall into two categories. First, Tolokan con-

tends that Mobil was required to identify the specific competitive offers it was meeting in order to satisfy its burden under section 2(b). That argument was flatly rejected in *Falls City Indus. v. Vanco Beverage, Inc.*, 451 U.S. 428, 448-51 (1983). There, the Court explained that a customer-by-customer requirement might make competition "unrealistically expensive" and was unlikely to result in prices different from those set according to information relating to competitors' territorial prices. *Id.* at 449.

As previously noted, Mobil personnel reviewed the prices charged by competitors in the market using publicly available information such as the Oil Price Information Service and the Lundberg Survey. Tr. (Jan. 18, 1991) at 76-78, 86-90 (Testimony of S. Pryor). The onerous customer-by-customer requirement Tolokan would engraft onto the meeting competition defense would effectively render the defense unavailable in highly competitive markets, such as the gasoline market in this case. As the *Falls City* Court recognized, section 2(b) imposes no such duty on the seller. Instead, the seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978) (quoting *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945)). Applying this standard, as instructed by the trial court, the jury determined that Mobil met that burden here. Tolokan raises no issue that would occasion the Court to disturb the jury's verdict.[10]

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[10] Interestingly, by measuring his alleged injury solely by the amount of the price difference, Tolokan admitted that Mobil's price to the Aldin station was a good faith effort to meet competition. His expert, Dr. Ronald W. Cotterill, testified that Aldin was a "big fish," Tr. (Jan. 16, 1991) at 25-26, and that were Mobil required to eliminate the price difference between Tolokan and Aldin, it

Second, Tolokan contends that Mobil cannot sustain the meeting competition defense here because the jury found that Aldin and Tolokan competed at the retail level. This fact does nothing to advance Tolokan's position. The argument that Mobil could not give Aldin its "wholesale" price because Aldin competed at the retail level is a meaningless semantic exercise that the Court has previously rejected. *Standard Oil Co.*, 340 U.S. at 236 n.4 (1951). If Mobil reasonably and in good faith believed that its competitors made gasoline available to Aldin at the same price they charged nonintegrated wholesalers, then section 2(b) permitted Mobil to meet that competitive price, regardless of whether Aldin was a wholesaler, a retailer, or both. The functional title Tolokan appends to the buyer is irrelevant. *Id.* Tolokan's exercise in semantics ultimately collapses into a repeat of his assertion that any discount not functionally or cost justified is unlawful under the Robinson-Patman Act. As such, it may be rejected out of hand.

Thus, even on the meeting competition issue, Tolokan's petition does not ask for resolution of any pressing question of federal law. Instead, it merely asks the Court to reweigh the facts and reach a conclusion different from the jury's. This misperceives the Court's function and plainly does not warrant the extraordinary grant of its discretionary review.

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would lower Tolokan's price rather than raise Aldin's. When asked to explain his reasoning, Dr. Cotterill said: "The price to Tolokan is the higher price. Mobil could not move the price for Aldin up to that price and retain Aldin, clearly." Tr. (Jan. 22, 1991) at 165. Since Mobil need justify only the lower price in order to satisfy its burden under section 2(b), *Falls City Indus.*, 460 U.S. at 442, Dr. Cotterill's statement concedes that Mobil's lower price to Aldin was necessary to retain Aldin's business. That is the essence of the meeting competition defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

MOBIL OIL CORPORATION

ABORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
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AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
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ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
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AYGAZ A.S.
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BANGKOK AVIATION FUEL SERVICES LIMITED
BARRORAFT PTY. LTD.
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BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
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COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
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COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
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COMPAGNIE RHENANE DE RAFFINAGE-CRR
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
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COOK INLET PIPE LINE COMPANY
COREDIS
CORYTON COGEN LIMITED
CYPRUS PETROLEUM REFINERY LIMITED

DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
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ERDOL-LAGERGESELLSCHAFT M.B.H.
ESTACIONES DE SERVICIO ML, S.A.
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ETABLISSEMENTS STARCK & CIE
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIBIL SA
FILTROS DE COSTA RICA, S.A.
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
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GATWICK REFUELLING SERVICES LIMITED
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GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
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HELLAS GAS STORAGE CO. S.A.
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K.K. SANKYO PLASTICS
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KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KURT AMMENN GMBH & CO. KG
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KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
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LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.

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MID STATE PETROLEUM PTY. LIMITED
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MOBIL CORPORATION (Parent)
MOBIL HOLDINGS BENELUX INC.
MOBIL KOREA LUBE OIL, INC.
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MOBIL MOTOR REST SA
MOBIL OIL—AFOR KERESKEDELMI KFT.
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SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
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SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
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SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE COLMARIENNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE COMBUSTIBLES DE PROVENCE
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
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SOCIETE DE GESTION DE DEPOTS D'HYDROCARBURES
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SOCIETE DES PETROLES DE ZERBI
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE
SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE JEAN ROUSSEL S.A.
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE
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SOCIETE TAHITIENNE DES OLEODUCS (STDO)
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SOCIETE TOGOLAISE D'ENTREPOSAGE
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STATION MANAGERS OF GUAM, INC.
STE CAMEROUNAISE EQUATORIALE DE FABRICATION DE LUBRIFANTS (S.C.E.F.L.)

STE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY, LIMITED
SUPERIOR DISK CORPORATION
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
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TEMA LUBE OIL COMPANY, LTD.
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THE NEW ZEALAND REFINING COMPANY LIMITED
THE SAUDI CAN COMPANY LTD.
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TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CHEMICAL CORPORATION
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN FILARE CO. LTD.
TONEN FILM CO. LTD.
TONEN KAGAKU NASU CO., LTD.
TONEN PROPERTIES INC.
TONEN SOGO SERVICE COMPANY, LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE, INC.

TONEN TANKER KABUSHIKI KAISHA
TONEN TAPYRUS COMPANY LIMITED
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TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY, LIMITED
TOYOSHINA FILM COMPANY, LIMITED
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TRANSALPINE OELLEITUNG IN OESTERREICH GESELLSCHAFT M.B.H.
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UBAG UNTERFLUR-BETANKUNGSANLAGE AG
UNITED KINGDOM OIL PIPELINES LIMITED
VALODIA
W.A.G. PIPELNE PTY. LIMITED
WAITOMO/BRENNAN PETROLEUM, LTD.
WAKO JUSHI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED
WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
ZAIRE MOBIL OIL, S.A.R.L.
ZAIRE S.E.P.

(4)

No. 91-993

Supreme Court, U.S.
FILED
JAN 24 1992
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In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Petition For Writ of Certiorari In The United States Court of Appeals For The Second Circuit

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REPLY BRIEF OF PETITIONERS

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STATEMENT OF REPLY ISSUES

INTRODUCTION

Mobil has raised two issues for the first time relative to this Petition in its Brief:

1. Is a buyer who is required to pay a discriminatorily higher price damaged under the law only where the favored buyer applies the substantial discrimination to a lower resale price; and

2. Is a quantification of damages under *Robinson-Patman* which ultimately equates to the amount of the discrimination, even when supported by independent expert testimony, condemned as being "automatic damages".

The arguments of Mobil, and the confusion in the lower courts, regarding each of these issues presents the threat of a substantial erosion of the protections intended by the Federal *Robinson-Patman Act*, 15 U.S.C. §13(a).

ARGUMENTS

I. WHETHER A DISCRIMINATION RESULTS IN AN OVERCHARGE OR UNDERCHARGE IS IRRELEVANT TO THE ULTIMATE EXISTENCE OF COMPETITIVE DAMAGE.

The essence of Mobil's claim that Mr.

Tolokan has suffered no damages, and that competition has not been injured,[1] rests upon the argument that any damages claimed to have been suffered must be calculated considering only the competitive effect of Aldin's lower price, without regard to the higher discriminatory price which Mobil exacted of Mr. Tolokan. Mobil extrapolates this illogical concept from the Opinion of Justice Cardozo in the case of *ICC v. United States*, 289 U.S. 385, 53 S. Ct. 607, 77 L. Ed. 1273 (1933).

An examination of *ICC v. United States*, shows that the holding, and each of the cases cited therein, relate uniformly to *regulated prices/rates* rather than to free market conditions. In each of those rate cases the "price" (i.e. rate) being charged to the plaintiff (the disfavored buyer) was the established rate set by a rate making authority. In each of those cases the regulated rate charged to the disfavored plaintiff was held to be "reasonable", even though the rate charged to the favored

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[1] Which is contrary to the jury's findings of injury to competition. (Verdict Form, App. B, Question 4.)

buyer was discriminatorily lower, e.g. *ICC v. United States*, *supra*, at 390. Since the rate charged to the disfavored buyer was, as a matter of law, "reasonable" (since set by regulation), the determination regarding the existence of damages in those cases was necessarily limited to a determination of the competitive effect which the *lower* rate charged to the preferred buyer had on competition.

The logic of the rate setting cases has no applicability to a free market scenario, however. In a free market, as is the case herein, a seller such as Mobil determines the prices which it charges to its purchasers without regard to regulation by any administrative agency.[2] Unlike the rate cases, the higher prices charged to Mr. Tolokan, in a free and unregulated market, cannot be deemed to be, as a matter of law, "reasonable". Therefore, all relevant facts and circumstances must be examined in order to determine whether or not a buyer who has suffered a discrimination, found to have resulted

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[2] Though petroleum products have, at times, been subject to governmental regulation, that is not a relevant issue in this case.

in injury to competition generally, has suffered damages. This inquiry cannot properly be limited to the sole determination of whether or not the favored purchaser has applied the benefits of its lesser acquisition price to its retail price, and thereby taken away the disfavored purchasers customers, or required the disfavored purchaser to price at a lower level. While such a limitation may be appropriate in the case of regulated prices, it is manifestly inappropriate to discriminations occurring in a free and unregulated marketplace.

The theory behind the inapplicable regulatory cases is clearly that the disfavored buyer obtained the rate which the law stated he was entitled to. Therefore, he could have only suffered damage if the lower price afforded to the favored buyer resulted in competitive injury to him. With a regulated rate, the "overcharge" referred to by Justice Cardozo in *ICC v. United States* could never have occurred. Conversely, in the unregulated marketplace where Mobil, Aldin and Mr. Tolokan did business, the discrimination which occurred

may be properly characterized as *either* an overcharge to Mr. Tolokan, or an improper lower price to Aldin. Mobil's attempt to limit the concept of damages to the principal of the lower price received by Aldin, to the exclusion of the consideration of the effects of the discriminatory overcharge suffered by Mr. Tolokan, is therefore wholly inappropriate. To permit such a claim would improperly allow a violator of the antitrust laws to avoid liability arising from the clear and reasonably foreseeable effects of its discrimination. *J. Truett Payne*, *supra*, at 1929; *Bigelow*, *supra*, at 264-265.

The record shows that the substantially favored price afforded to Aldin provided it with great marketing latitude, allowed it to basically ignore customary price-volume considerations, maximize its profits on each gallon of gasoline which it sold by using the discrimination, and expend considerable sums in the remodeling of its facility. As a direct result of Mobil's discrimination, Mr. Tolokan was deprived of these opportunities. Had Mr. Tolokan been afforded the

pricing and profit opportunities Mobil afforded to Aldin, he could have lowered his price, generated additional profits and capital, modernized his facility, installed self-service and new tanks, etc. and thereby have been more competitive. (January 11, 1991 Tr. pp. 67-72, 83-84; January 16, 1991 Tr. pp. 18-22; 186.)

In such circumstances:

> "It is unnecessary that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition." *Foremost Dairies, Inc. v. F.T.C.*, 62 F.T.C. 1344, 1352 (1963) *aff'd.* 348 F.2d 674, 680 (5th Cir. 1965), *cert. den.* 832 U.S. 959.

In *Foremost*, the Court found (at page 680) that the existence of injury could be properly inferred where the discriminatory reduction afforded to the favored buyer a significant aggregate saving that, *if* reflected in a resale price cut, would have had a noticeable effect on the

purchasing decisions of customers. This was irrespective of whether such retail price cuts were actually afforded by the favored buyer.

To adopt Mobil's argument would allow discriminating sellers to afford substantial marketing benefits to favored buyers, which benefits have no relationship whatsoever to market efficiencies, meeting competition, the actual functions performed by favored buyers, or cost justifications. Such unjustified discriminations have been uniformly condemned. *Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990).

Following Mobil's argument, the only act that would have to be performed by a favored purchaser in order to insulate both it, and its discriminating seller, from antitrust liability would be to set its resale prices at a level comparable to, or above, the disfavored buyer. Regardless of the substantial additional profits which would be reaped by such a potentially inefficient favored buyer, a discriminating seller and its favored buyer could wholly avoid liability while effectuating a discrimination

which was otherwise indefensible. If the favored buyer departed from its "insulating activities", the discriminating seller could simply alter its price to that of the disfavored buyer in order to restore uniformity and avoid antitrust liability. Such a situation would hardly advance the intended purposes of the antitrust laws.

A determination by this Court is therefore required in order to determine the issue of whether a disfavored buyer is barred from suffering antitrust damages unless the favored buyer applies the discrimination directly to lower resale prices,[3] rather than applying the discrimination to substantially increased profit margins.[4]

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[3] *See e.g.: Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990); *Enterprise Industries v. Texas Co.*, 240 F.2d 457 (2d Cir.) *cert. den.* 353 U.S. 965 (1957), holding that no antitrust injury occurs unless the discrimination is reflected in lower resale prices.

[4] *See e.g.: Kroger Co. v. F.T.C.*, 438 F.2d 1372, 1378 (6th Cir. 1971); *National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517, 522 (7th Cir. 1968); *Beatrice Foods Co. et al.*, 76 F.T.C. 725, 803 (1967); *E. Edelmann & Co. v. F.T.C.*, 239 F.2d 152, 155 (7th Cir. 1956), holding that where a substantial and long term discrimination existed, antitrust damage occurs regardless of whether the favored buyer undersells competitive rivals, recognizing that the favored buyer can achieve a more sound competitive

II. THE "AUTOMATIC DAMAGES RULE" DOES NOT PRECLUDE USE OF THE AMOUNT OF THE DISCRIMINATION TO QUANTIFY ANTITRUST DAMAGES, OR TO SUBSTANTIATE THE FACT OF INJURY.

Mobil claims that Mr. Tolokan seeks to prove both the existence of antitrust injury, and the quantification of that injury, through the application of an "automatic damages rule". Mr. Tolokan seeks to do neither. Mobil merely attempts to blur the distinction between the importance of the "fact" of injury, which is subject to proper inference and presumption, and the quantification of damage. Knowing that the improper consideration of the meeting competition defense prevented the jury from ever reaching the question of proper quantification of damages, Mobil has nevertheless attempted to inject this issue in order to avoid consideration by the Court.

In order to recover treble damages under Section 4 of the *Clayton Act*, after having made the requisite

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operation long term, while minimizing or ignoring generally applicable competitive factors effecting the competitive abilities of its disfavored competitors.

showing that Mobil's discriminations may have lessened competition, Mr. Tolokan was required to show that his business had been injured in a manner causally connected to the discrimination. Once the existence of such injury had been proven, evidence was required to be submitted to quantify the amount of those damages. However, evidence as to the amount of such damages may be less precise. *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 451 U.S. 557, 558, 565-567 (1981). In *J. Truett Payne* the discrimination complained of related to sales quota rebates which were claimed to have been discriminatorily applied in a manner unfavorable to the plaintiff. No evidence was presented quantifying the alleged discrimination on a per unit basis. The plaintiff presented no documentary evidence regarding the effect of the alleged discrimination on either the plaintiff's or its competitors' retail prices. *J. Truett Payne*, *supra*, at 559-560, 563-564. Rather, the plaintiff merely relied upon the application of the "automatic damages" rule to meet its burden of proof regarding not only the existence of

antitrust injury, but the quantification of that injury as well.

The evidence presented in this case goes far beyond any attempt to show the existence of antitrust injury, or to quantify those damages, through the mere application of an automatic damages rule. First, there is a clear presumption that injury occurred under the facts herein. *Texaco, Inc. v. Hasbrouck*, *supra*, at 2551;[5] *see* Petitioner's brief at pp. 19-23. It is also appropriate to show the existence of antitrust injury by comparing the profit margins available to a disfavored plaintiff against the profit margins made available to the favored buyer as a result of the discrimination. Where those profits available to competitors are at variance as a *result* of the discrimination, the evidence is sufficient to support a "just and reasonable inference" of injury. *J. Truett Payne, supra*, at 566, citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

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[5] Holding that there was "no doubt" that plaintiffs' proof of a continuing discrimination throughout a nine year period was sufficient to show injury.

Herein Mobil's argument is based totally upon the claim that, in ultimately quantifying the damages suffered by Mr. Tolokan as a result of the discrimination, Mr. Tolokan's expert was of the opinion that the most accurate way to determine such damages, using the fewest assumptions, would result in a damage figure equal to the amount of the discrimination. The cases condemning the mere mathematical application of an automatic damages rule do not stand for the proposition that a calculation, otherwise supported by relevant evidence and expert testimony, is to be condemned simply because the ultimate quantification equates to the actual amount of the discrimination. The only process which those cases condemn is the use of a mathematically computed automatic damages amount "without more". *J. Truett Payne, supra,* at 565-567. The law requires a plaintiff to provide adequate evidence to support its injury and damages quantification theories, rather than merely applying an automatic damages computation. Mr. Tolokan has provided extensive evidence in that regard.

Having met his burden of proving the existence of injury attributable to the discrimination, a less rigorous standard is applicable to the quantification of those damages. *J. Pruett Payne*, *supra*, at pp. 566-7; *Bigelow*, *supra*, at 580. In that regard, Mr. Tolokan's expert provided alternate theories quantifying the damages suffered. The first theory, which Mr. Tolokan's expert supported through extensive graphs and underlying documentation, supported the expert's logical opinion that the amount of damage incurred by Mr. Tolokan was equal to the discrimination since, if Mr. Tolokan had maintained his retail pricing practices, it was reasonable to expect that his volume of past sales would have remained unaltered, and his margin of profit would have increased commensurate with the amount of discrimination which Aldin had been favored with.[6]

Mr. Tolokan's expert also presented two alternate theories, resulting in a greater amount of damages being

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[6] This method of computation was approved by the Court in *Bigelow v. RKO Radio Pictures, Inc.*, *supra*, and again in *J. Truett Payne*, *supra*.

computed. However, the expert testified that the preferred theory was that first presented because of the limited assumptions necessarily applicable to the first alternate theory. However, both the first ($425,587.42) and second ($462,000) theories were stated to be sound.

It is therefore abundantly clear that Mr. Tolokan has not sought to apply a mere mathematically computed automatic damages rule "without more" to substantiate either the existence of injury or the quantification of those injuries. To the contrary, it is indisputable that Mr. Tolokan's business was, in fact, injured by the substantial and continuing long term discriminatory advantage given to the favored Aldin station. Having met his burden of proving the fact of injury as a result of the discrimination, Mr. Tolokan's burden of precisely quantifying those damages is substantially lessened. *J. Truett Payne*, *supra*, at 566-567. Mr. Tolokan has also satisfied that burden.

Mobil's claim that a damages quantification that equates to the proven discrimination is condemned as "automatic damages", or that Tolokan attempts to apply

an "automatic damages" standard, are therefore unsupportable.

A determination by this Court is therefore required in order to clarify the question of whether those suffering price discriminations are barred from using the amount of the discrimination in order to quantify their damages when "more" than a mere mathematical computation is used, i.e. what did this Court mean when it stated "without more" in *Truett Payne, supra*, at 565-567.

CONCLUSION

For the reasons set forth herein, and within Petitioner's Brief, the Petitioner respectfully requests that a Writ of Certiorari be granted.

Dated this 22nd day of January, 1992.

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